No. 12900

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING,
Appellants,

vs.

TORKEL WESTLY, The Tax Commissioner of the Territory of Hawaii,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR APPELLEE

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No. 12900

IN THE

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FOR THE NINTH CIRCUIT

J. ELROY MCCAW and JOHN D. KEATING, *Appellants,* vs. TORKEL WESTLY, The Tax Commissioner of the Territory of Hawaii, *Appellee.*	UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

BRIEF FOR APPELLEE

STATEMENT AS TO JURISDICTION AND QUESTIONS INVOLVED

This is an appeal pursuant to 28 U.S.C. 1291 and 1294 from a judgment of the United States District Court for the District of Hawaii (R. 159-160).

The appellants' complaint invoked 28 U.S.C. 1331, 1332, and 1337. It attacked the validity of, and sought to enjoin the appellee Tax Commissioner from enforcing, a territorial tax law, Chapter 101 of the Revised Laws of Hawaii 1945, and asked for declaratory relief (R. 3-30). The judgment dismissed the action "without prejudice" (R. 159-160), "for the reasons stated in its [the Court's] oral ruling dated January 24, 1951" (R. 160). Said oral ruling was upon the ground that litigation as to the validity of a territo-

rial tax statute should be conducted in the territorial courts, but if (contrary to the Court's conclusions) it should develop that appellants could not obtain hearing on their contentions in the territorial courts then they might return to the federal court (R. 466-471).

Appellee submits that the court below rightly dismissed the action under the Johnson Act (28 U.S.C. 1341)[1] and the policy therein set forth; accordingly the judgment below should be affirmed (Point I of Argument, *infra*). However, looking at the case from the standpoint of appellants' contention that the Johnson Act and the policy therein set forth do not apply, appellee submits that this contention leads only to the conclusion that the case should have been held in the District Court awaiting the outcome of litigation in the territorial courts (Point II of Argument, *infra*). The case is very far from having reached the point of decision on the merits; in no event could it result in the summary judgment which appellants (Br. 39-64) seek here. This aspect of the case is Point III of the Argument, *infra.*

It thus appears that if there was error in the court below it consisted only in the proposition that the District Court should have held the case instead of dismissing it without prejudice. Under the "harmless error" rule this would not be reversible error. The judgment below should be affirmed as correct, or the appeal dismissed because nothing of substance is involved.

Alternatively, the Court might hold this case on its docket pending final disposition of the similar litigation in the territorial courts.[2] That litigation was instituted by these appellants in the Circuit Court of the Territory, First Circuit. It has been tried and judgment has been rendered for

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[1] "§ *1341. Taxes by States.* The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[2] *Georgia R.R. and Banking Co.* v. *Redwine,* 339 U.S. 901, 342 U.S. 299, 863, p. 18, *infra.*

appellee. It is about to be appealed to the Supreme Court by these appellants (Br. 12), and is appealable from the Supreme Court to this Court. Decision thereon in this Court would dispose of the present case as well.

STATEMENT OF THE CASE

Appellants are a co-partnership known as Island Broadcasting Company, operating radio station KPOA in Honolulu, Territory of Hawaii. On November 15, 1950 they filed this action in the United States District Court (R. 3-30). The complaint set forth that Congress had preempted the subject matter of radio broadcasting to the exclusion of state and territorial taxation (Br. 3), and that appellants' broadcasting was so essentially interstate commerce that it could not be taxed (R. 14-20, 24). Appellants moved for a temporary injunction (R. 36), and for summary judgment (R. 113-131).

Appellee filed a motion to dismiss the complaint, attacking it for failure to show grounds for equitable relief, for failure to take the case out of the Johnson Act (28 U.S.C. 1341) and the policy therein set forth, and upon other grounds (R. 36-40). Appellee also filed Objections to the Motion for Interlocutory Injunction (R. 40-52), and a Motion for Summary Judgment (R. 141-144).

Each party filed supporting affidavits and exhibits. Appellants' appear at R. 30-35, 114-131, 154-157 together with a number of unprinted exhibits; appellee's appear at R. 52-113, together with a number of unprinted exhibits. Appellee attempted to narrow the factual disputes by a Request for Admission of Facts (R. 144-146), but after the Answer to the request had been received (R. 148-154) little had been accomplished toward that end.

The extent to which facts are undisputed, and the extent to which disputed, will be set forth in the Argument in this brief. The appellants' analysis is far apart from the record, the case being treated by them as if only a Motion

to Dismiss had been filed without any other showing, and as if all the pleadings were in and appellee had stood upon that motion.

When the cause came on for hearing on the motions the Court "laid aside the various motions of the parties and raised on its own the question of whether or not it had jurisdiction and if so, should it as a matter of judicial discretion exercise the same" (R. 159). After hearing argument thereon, for which very considerable time was allowed, the Court ruled:

> That the Territory of Hawaii is so constituted under the Hawaiian Organic Act that its tax litigation is protected by the Johnson Act (28 U.S.C. 1341) and the policy therein set forth (R. 468).
>
> That the remedy of the taxpayers was to pay under protest and sue for a refund in the territorial court, this being an adequate statutory remedy and there being adequate provision for interest (R. 469).
>
> That under the statute penalties became part of the tax and were recoverable if the tax was recoverable (R. 469).
>
> That if grounds for an equity application existed the taxpayers could resort to the equity court of the Territory, there being no statute prohibiting such an equity suit (R. 470).
>
> That the complaint would be dismissed but such dismissal would be without prejudice, in order that appellants might return to the federal court if, contrary to the conclusions reached, the appellants could not obtain hearing on their contentions in the courts of the Territory (R. 471).

The above ruling was made January 24, 1951 and Judgment Dismissing the Action Without Prejudice was entered thereon February 5, 1951 (R. 159-160). A week later appellants filed a "Motion to Set Aside, or to Modify,

Judgment Dismissing Action Without Prejudice" (R. 160-163); this motion announced the intention of appellants to pursue a remedy in the territorial courts and asked that the present case be retained meanwhile instead of being dismissed, appellants' view being that if this were done an appeal would not be necessary "until a complete answer is obtained in the Territorial Courts as to whether Plaintiffs have or have not a remedy therein" (R. 161). This motion was denied on the ground that the matter of retention of jurisdiction pending pursuit of a territorial remedy was fully considered upon the original argument (R. 163-164).

Appellants thereafter brought an action in the Circuit Court of the Territory, First Circuit, employing the statutory remedy of payment under protest followed by suit for recovery.[3] After the action was at issue in the circuit court on the appellants' complaint, the appellee's answer and counterclaim, and the appellants' replication thereto, appellants applied to the Circuit Court for a stay of the proceedings they had instituted. This having been denied and the case having been set for trial appellants applied to the Supreme Court of Hawaii for a writ of prohibition to forbid further proceedings in the Circuit Court. This writ was denied in an opinion rendered November 26, 1951,[4] from which the above cited facts appear.

From here on, the facts as to the territorial litigation are not of record, but it is conceded by appellants that the cause has been tried and has been decided against them in the Circuit Court (Br. 12).[5] Appellants presently are appealing from the decision of the Circuit Court of the Territory to the Supreme Court of Hawaii (Br. 12). When that case reaches this Court the record will show that the complaint

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[3] Section 1575, Revised Laws of Hawaii 1945. See *infra*, p. 11.

[4] *McCaw and Keating* v. *Willson C. Moore as Judge of the Circuit Court,* Supreme Court of Hawaii No. 2881, 39 Haw. 157.

[5] Appellants having offered to produce the oral and written decision of the Circuit Court (Br. 13) appellee will refer to it in the Argument, *infra*.

in the territorial court is practically the same as the complaint in the court below.

ARGUMENT

I

THE COURT BELOW RIGHTLY DISMISSED THE ACTION UNDER THE JOHNSON ACT AND THE POLICY THEREIN SET FORTH.

A. **Scope of the Act; the policy involved.** The Johnson Act (28 U.S.C. 1341) provides that:

> "§ **1341. Taxes by States.** The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

This statute is derived from the Act of August 21, 1937.[6] It was founded on the already long established policy of remitting taxpayers to their remedies in the state courts where adequate.[7] Congress particularly desired to free, from interference by federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid.[8] Under the statute and long established policy on which it was based, it is true, whether the relief sought is equitable or declaratory, that:

> "* * * it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any chal-

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[6] 50 Stat. 738, c. 726, amending the first paragraph of section 24 of the old Judicial Code, former 28 U.S.C. 41 (1). The Act added a sentence to provide that "no district court shall have jurisdiction" of any suit to restrain state tax collection where an adequate state court remedy exists "at law or in equity." The Reviser's Notes show that section 1341 restates this sentence, the words "at law or in equity" having been omitted as unnecessary.

[7] *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 297-301, citing *Matthews* v. *Rodgers,* 284 U.S. 521, 525-6.

[8] *Great Lakes Dredge and Dock Co.* v. *Huffman, supra,* citing S. Rep. No. 1035, 75th Cong., 1st Sess.; H.R. Rep. No. 1503, 75th Cong., 1st Sess.

lenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back."[9]

The Johnson Act and the policy there stated apply, as well, when the taxpayers can be heard in a state court for equitable relief. A decisive case is *Whitmore* v. *Ormsbee,* 329 U.S. 668, aff'g per curiam 64 F. Supp. 911. That was an action to enjoin enforcement of the New Mexico privilege tax upon radio stations, measured by the gross receipts from radio broadcasting and similar to the tax involved here. A three judge court held that radio broadcasting is in part intrastate commerce and in part interstate commerce (the court citing the *Fisher's Blend case,* 297 U.S. 650, which appellants here interpret differently), that the question involved was whether the state tax imposed an undue burden upon the interstate commerce, that the Johnson Act applied to this question as well as any other, that the ordinary method of payment under protest was adequate, and that if this method should be burdensome by reason of the large amount of accumulated back taxes and penalties, then equitable relief in the state court would be an adequate remedy, and this notwithstanding a state statute forbidding injunctive relief in tax cases which, however, the state courts had held did not apply in extraordinary circumstances. Hawaii has no statute limiting injunctive relief in tax cases.

When the Supreme Court of the United States affirmed the *Whitmore* case per curiam, it was upon the authority of *Hillsborough v. Cromwell*[10] upon which appellants rely, and *Matthews v. Rodgers, supra.*[11]

B. **Applicability of the Johnson Act in Hawaii.** The Johnson Act and the policy there stated apply in Hawaii.

[9] *Great Lakes Dredge and Dock Co.* v. *Huffman, supra,* 319 U.S. at pp. 300-301 (a declaratory relief case); *Toomer* v. *Witsell,* 334 U.S. 385, 392 (injunctive relief case).

[10] 326 U.S. 620, 623.

[11] 284 U.S. 521, 525, note 7, *supra.*

The courts of the Territory of Hawaii occupy a relatively similar position to the federal courts as do state courts, and this principle makes applicable the rules of law as to the types of litigation to be left by federal courts to state courts.[12] Such a rule is involved here.

It is not material whether the Johnson Act applies by its terms, the word "state" being read to include territories as it sometimes is,[13] or whether it applies because the Hawaiian Organic Act and the case law make applicable the policy stated in the Johnson Act.[14] Whether or not the statute literally applies it was the court's duty to adhere to the long standing policy expressed in it.[15]

C. **Appellants did not meet the Johnson Act.** The complaint set forth that the time for appeal to territorial courts had expired (R. 27, par. XXIV) ; that if the tax were paid the defendant would not have sufficient means to respond to a judgment for its recovery (R. 28, par. XXV) ; that "the slightest financial burden" would affect appellants and they had invested in the station in the belief that Congress had preempted the field of radio communication (R. 8, par. V; R. 22-23, par. XIX) . These, and other contentions since made, will be considered in the following paragraphs. In none of them did the appellants meet the Johnson Act or the policy there set forth.

1. The appellants' theory that, by letting their time for appeal expire, they excused themselves from resorting to territorial courts, in any event is met by the fact that another remedy remained, that of payment under

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[12] *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 383; *Ackerman* v. *I.L.W.U.,* 187 F. 2d 860, 868 (C.A. 9th), cert. denied 342 U.S. 859; *Alesna* v. *Rice,* 172 F. 2d 176, 178-9 (C.A. 9th), cert. denied 338 U.S. 814; *Wilder S.S. Co.* v. *Hind,* 108 Fed. 113, 115, 116 (C.A. 9th), aff'd 183 U.S. 545.

[13] *Andres* v. *United States,* 333 U.S. 740, 745; *Waialua Co.* v. *Christian,* 305 U.S. 91, 109, 138.

[14] Note 12, *supra.*

[15] *Great Lakes Co.* v. *Huffman,* supra; *United States* v. *City of New York,* 175 F. 2d 75 (C.A. 2d), cert. denied 338 U.S. 885.

protest followed by suit for recovery under the statute, section 1575 of the Revised Laws of Hawaii 1945. Under this latter statutory remedy the territorial litigation brought by appellants has proceeded.

Moreover, *Hillsborough v. Cromwell,* 326 U.S. 620, on which appellants rely (Br. 31) does not hold that one can take himself out of the Johnson Act by ignoring his state remedy; it holds that a state remedy is inadequate which affords no reduction of a tax assessment in the event of discriminatory taxation, permitting only that the taxpayer discriminated against obtain an increase in the taxes of others. Reference by the court to the expiration of time for appeal to the State Board of Tax Appeals[16] was upon consideration of the question whether the rule of *Spector Motor Co. v. McLaughlin*[17] should be applied.

2. The allegation in the complaint that if the tax were paid the defendant would not have sufficient means to respond to a judgment for its recovery, overlooks that the suit for recovery is not against the Tax Commissioner personally but to the contrary is a statutory remedy that in effect is a suit against the Territory of Hawaii.[18] This statutory remedy has been employed in the Territory in many instances to determine the applicability and validity of territorial tax laws.[19]

3. The allegation in the complaint that the imposition of the tax was unexpected and any tax at all would be a burden, is met by *Whitmore v. Ormsbee, supra,* which holds that if there are extraordinary circumstances preclud-

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[16] 326 U.S. at p. 628; Br. 32. See p. 7, *supra*.

[17] 323 U.S. 101, *infra* Point II.

[18] *Wright* v. *Borthwick,* 34 Haw. 245, 255; *Great Northern Insurance Co.* v. *Read,* 322 U.S. 47; *Ford Co.* v. *Department of Treasury,* 323 U.S. 459.

[19] *Brodhead* v. *Borthwick,* 174 F. 2d 21 (C.A. 9th), aff'g 37 Haw. 314, cert. denied 338 U.S. 847; *Pan American Airways* v. *Godbold,* 36 Haw. 170; *Wright* v. *Borthwick, supra,* 34 Haw. 245; *Bishop* v. *Hill,* 33 Haw. 371; *New York Life Ins. Co.* v. *Hapai,* 21 Haw. 424.

ing resort to the ordinary method of payment under protest, then resort should be had to the state equity court, the Johnson Act having the effect of remitting the taxpayer there. Moreover, this allegation falls short of an allegation of inability to pay. Instead, the complaint alleges refusal to pay (R. 28, Par. XXV). Furthermore, appellee showed by the affidavit of the deputy tax commissioner and the books of the company (these exhibits being incorporated by reference in the Objections to Interlocutory Injunction [R. 51] and Motion for Summary Judgment [R. 143]) that the imposition of the tax was not unexpected or beyond the financial ability of the company. The tax was returned and paid for the first fourteen months of the station's existence (R. 53). The claim that broadcasting income could not be taxed first was presented in the report of income for December, 1947 (R. 54). On July 20, 1948, the Tax Commissioner sent the taxpayer a preliminary notice of assessment (R. 56) and at that time the taxpayer set up a reserve for the tax (R. 102) which has continued to be maintained (R. 100-102). Over and above the sums required to maintain this reserve for the tax, the taxpayer earned profits (R. 93-99) which in 1950 were coming in at the rate of $8000 per month (R. 98-99). The working-capital position (ratio of current assets to current liabilities inclusive of the contested tax) was better than 3 to 1 (R. 107-108).

There was no offer to meet the foregoing facts. While appellants in oral argument offered to show (R. 383-384) why they drew so heavily on their partnership earnings just before they commenced this suit (R. 111) and after the tax was demanded (R. 59-60), irrespective of the reason for this the financial condition of the company, even after these drawings, was as already stated.

4. In oral argument appellants made the further contention, not contained in the complaint,[20] that if they

[20] Citations in the brief of what "was alleged" in this regard (Br. 9, 30) are citations to the record of oral argument.

paid under protest and were successful in sustaining their contentions as to the invalidity of the tax, they would not be refunded that portion of their payment consisting in the penalties and interest by which the tax had increased during the period of non-payment preceding resort to the remedy of payment under protest. Appellants' brief relies on this argument (Br. 5, 9-10, 30-31, 34-35). It is based on statutory provisions not here involved; in any event it is erroneous.

Unquoted by appellants is the statute providing for payments under protest, the statute under which the parallel territorial litigation actually has proceeded, section 1575 of the Revised Laws of Hawaii 1945, which provides in pertinent part as follows:

> "**Sec. 1575. Payment to Territory under protest.** Moneys representing a claim in favor of the Territory may be paid to a public accountant of the Territory under protest in writing signed by the person making such payment, or by his agent, setting forth the grounds of such protest, in which event the public accountant to whom such payment is made shall hold the money so paid for a period of thirty days from the date of payment.
>
> Action to recover the money so paid, or proceedings to adjust the claim may be commenced by the payer or claimant against the public accountant to whom the payment was made, in a court of competent jurisdiction, within such period of thirty days, and in default of bringing such suit or proceedings within such period, the money so paid shall be by such accountant deposited in the treasury of the Territory, and the same shall thereupon become a government realization.
> *******"

The action is to recover "money so paid", "representing a claim in favor of the Territory". The action could be brought in protest of claims for rent of public lands, tariffs of the Board of Harbor Commissioners, taxes, penalties, or any other protested claim.

Appellants' argument (Br. 10) seeks to overlay on section 1575 certain administrative tax appeal provisions that are not involved and on which appellants place a forced misconstruction. There are short answers to the argument. First, if any territorial officer so misconstrued the tax appeal provisions that misconstruction could be protested under section 1575, such being the purpose of the section. Second, the argument assumes, in flat disregard of the pertinent statutory provision[21] that the word "tax" does not include penalties and interest added to the tax and becoming "a part of such tax", as the statute quoted in note 21 provides. Of course the rule is that words used in a statute mean what the statute says they mean.[22] Contrary to appellants' implication that the court and appellee dodged the issue (Br. 10), this obvious answer was made by appellee in argument (R. 272) and the court so ruled, saying:

> "***the particular law under which taxes claimed to be due makes any penalty that is assessable a part of the tax, and if the tax is recoverable, why, the part goes with it, for the whole consists of all of its parts." (R. 469).

Of course if the tax is valid and not refundable the penalties are not refundable either. The rule in Hawaii is the usual rule which this Court has followed,[23] i.e. where the tax law provides for penalties and interest, one who contests

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[21] "*Sec. 5463. Penalty for delinquency.* A penalty of ten per centum shall be added to and become a part of any tax or portion thereof becoming delinquent, and in addition thereto said tax as so increased shall bear interest at the rate of two-thirds of one per centum for each month or fraction thereof from the expiration of fifteen days from the date of delinquency until paid, which interest shall be added to and become a part of such tax."

[22] *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 95, stating the general rule; *State of California* v. *Hisey,* 84 F. 2d 802, 805 (C.A. 9th) stating the rule that penalties and interest are a part of a tax when and to the extent that the tax statute so provides.

[23] *Washington Water Power Co.* v. *Kootenai County,* 270 Fed. 369, as modified 273 Fed. 524 (C.A. 9th), following *Spencer* v. *Babylon R. Co.,* 250 Fed. 24 (C.A. 2nd) and other cited cases; *State of California* v. *Hisey, supra,* 84 F. 2d 802, 805 (C.A. 9th).

a tax is liable to penalties and interest upon the amount unpaid if found to be legally due. Under this rule the taxpayer, in whatever tribunal he litigates the validity of the taxes, does so in peril of the penalties and interest accrued for non-payment.[24]

The tax law here involved attaches no penalties or interest to taxes on duly reported income claimed to be exempt until after at least thirty days preliminary notice of proposed assessment followed by actual assessment and the lapse of twenty-one days thereafter.[25] At that time there expires the opportunity for an administrative appeal[26] to a Board of Review or the Tax Appeal Court (whence an appeal lies to the Supreme Court of Hawaii) and the tax becomes delinquent and carries a lump sum penalty plus a monthly addition after fifteen further days.[27] Where the tax is assailed as invalid or inapplicable the remedy of payment under protest still remains under section 1575 of the Revised Laws of Hawaii 1945, *supra.*

The regular assessment procedure was followed (R. 56-57, 59-61). Appellants let the taxes go delinquent and the time for appeal expired. Then suit was commenced in the court below, followed by the suit in the Circuit Court of the Territory brought by appellants under section 1575.

Section 5535, Revised Laws of Hawaii 1945, quoted in part on page 9 of appellants' brief, is the administrative appeal provision of the net income tax law, not the tax law involved. The only bearing of section 5535 is that in section 5473, the administrative appeal provision of the tax law

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[24] *Spencer* v. *Babylon R. Co., supra.*

[25] Section 5467, Revised Laws of Hawaii 1945, as amended by Act 253, Session Laws of Hawaii 1945 and Act 111 Session Laws of Hawaii 1947.

[26] Section 5473, Revised Laws of Hawaii 1945, as amended by Act 92, Session Laws of Hawaii 1945; and Chapter 95, Revised Laws of Hawaii 1945.

[27] Section 5463, quoted in note 21.

here involved,[28] the details as to time, method of appeal and procedure are supplied by reference both to section 5535 and to Chapter 95, Revised Laws of Hawaii 1945, an administrative appeal chapter of general application in tax matters.

Section 5535 of the net income tax law, on which appellants rely, is quoted in full in the note.[29] The last sentence of the last paragraph commences with the words:

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[28] "*Sec. 5473. Appeal; correction of assessment.* If any person having made the return and paid the tax for any month or any year as provided by this chapter feels aggrieved by the assessment so made upon him by the tax commissioner, he may appeal from said assessment in the manner and within the time and in all other respects as provided in section 5535. The hearing and disposition of such appeal, including the distribution of costs and of taxes paid pending the appeal, shall be as provided in chapter 95."

[29] "*Sec. 5535. Appeal.* Unless otherwise barred by the provisions of this chapter from so doing, any taxpayer who has made an income tax return as aforesaid, or against whom has been made an additional assessment under section 5530, paragraph (2), or an assessment under section 5528, may appeal from the assessment within the time hereinafter set forth, either to the divisional board of review or to the tax appeal court, in the manner and with the costs provided by chapter 95, except as otherwise in this chapter provided.

If the appeal is first made to the board, the appeal shall either be heard by the board or be transferred to the tax appeal court for hearing at the election of the taxpayer, and if heard by the board an appeal shall lie from the decision thereof to the tax appeal court and to the supreme court in the manner and with the costs provided by chapter 95. The supreme court shall prescribe forms to be used in such appeals which shall be as nearly identical as practicable with the forms prescribed or permitted by law in the case of property tax appeals; *provided,* that such forms shall show the amount of taxes upon the basis of the taxpayer's computation of taxable income, the amount of taxes upon the basis of the assessor's computation, the amount of taxes upon the basis of the decisions of the board of review and tax appeal court, if any, and the amount of taxes in dispute. If or when the appeal is filed with or transferred to the tax appeal court, the court shall proceed to hear and determine the appeal, subject to appeal to the supreme court as is provided in chapter 95.

Any taxpayer appealing from any assessment of income taxes shall lodge with the assessor or assistant assessor a notice of the appeal in writing, stating the ground of his objection to the additional assessment or any part thereof, which notice of appeal shall be filed at any time within twenty days subsequent to the date

"No taxpayer shall be exempt from delinquent penalties by reason of having made an appeal on his assessment,****" These words have to do with net income tax appeals; the tax law here concerned is bottomed on the premise that the tax will be paid (and under Chapter 95 held in a special deposit) before taking of the appeal,[30] hence envisages no delay in payment by reason of the making of an appeal. The net income tax law, however, does not require that the tax be paid as a condition of the appeal, hence in the above quoted words it sounds a warning that the usual rule[31] will be invoked, i.e. the decision to litigate will not excuse the litigant from penalties and interest if he proves to be wrong. The net income tax provision then continues with the assurance (also contained in Chapter 95) that the taxpayer's payment will be held in special deposit awaiting the final determination of the appeal. In describing the payment as "the tax paid", the legislature included penalties and interest added to the tax and becoming a part of it.[32] The "tax paid", i.e. as originally assessed, or as increased by penalties and interest, will be repaid whenever it is determined that it was upon non-taxable valuation or income, as the case may be. That is what Section 5535, and Section 5219 of Chapter 95 (Br. 9), provide.

5. In their brief in this Court appellants for the first time contend that the Territory "agreed to this suit in the Federal Court", and is not in a position to contest its being heard there (Br. 4-9). This is not correct. Appellants' brief quotes portions of the oral argument. In other

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when the notice was mailed properly addressed to the taxpayer at his last known residence or place of business. No taxpayer shall be exempt from delinquent penalties by reason of having made an appeal on his assessment, but the tax paid, covered by an appeal duly taken, shall be held in a special deposit and distributed as provided in section 5219, for which purpose the word 'valuation' shall be deemed to refer to the amount of income."

[30] Note 28, *supra.*

[31] Notes 23-24, *supra.*

[32] Note 22, *supra.*

portions of the argument appellants' counsel admitted that the Territory always had disagreed with appellants' position that the federal suit was the proper remedy and had made no agreement to waive the point (R. 226, 264-266, 290-293, 330). The following quotations from the argument make the point clear:

"* * * * *

> The Court: It was last summer that you said that the [52] Territory demanded that it be paid, is that it?
>
> Mr. Davis: Yes, sir, that was the time, last summer. So I wrote to the Attorney General and got 60 days in which to prepare this case, and they very graciously gave it to me. And I told Miss Lewis at the time, *and I told the Attorney General, that if anything occurred by virtue of their graciousness to me, that I would be very glad to waive it myself.* So it was in November that I filed the suit and it has been brought up to the moment.

* * * *"

(R. 226; italics added.)

"* * * * *

> Miss Lewis: Certainly it was my understanding, part of our understanding, that pending the application for a temporary injunction we weren't going to sue. In other words, Mr. Davis was given this opportunity to pursue what he thinks is the proper remedy, and which *we have stated from the beginning we considered not the proper remedy.*
>
> The Court: So that the problem I alluded to is in general covered by agreement of Counsel?
>
> Miss Lewis: The problem you alluded to is, why we haven't sued, and that is the reason.
>
> The Court: All right.
>
> Mr. Davis: Since I came into the case it was August, I think, wasn't it?
>
> Miss Lewis: Well, . . .
>
> Mr. Davis: Everything we agreed to that you said about yourself is true, since August.

* * * *"

(R. 265-266; italics added.)

In any event, the Court could not be precluded from disposing of the case under the Johnson Act policy, because it was the Court's duty to do so.

6. Appellants now contend that appellee agreed with appellants that in the suit in the territorial court "a general denial would be interposed by appellee and the issues simplified as to the Constitutional questions" (Br. 11-12). Appellee categorically denies this; the Territory was free to plead as best suited its case. The matter is outside the record and in any event immaterial.

7. Appellants (Br. 12-13) assail the local practice in the matter of the form of decision. Again this is outside the record. The attorney who wrote appellants' brief is not a member of the Hawaii bar and is not in a position to inform this Court as to the local practice. When the record from the territorial court reaches this Court it will show that:

On January 11, 1952, after the taking of evidence had been concluded, appellee served and presented to the Court "Proposed Findings and Conclusions". On January 14, 1952 the case was argued. On January 15, 1952 the Court rendered its oral decision in favor of appellee, and inter alia approved the proposed findings. On January 28, 1952, after opposing counsel had had for a week the draft of written decision prepared by appellee's counsel, it was submitted to the judge, who made some changes in it. The written decision specifically stated that the "oral decision, as reflected in the official reporter's notes, is incorporated herein by reference". At the hearing on the form of decision, which was held on January 28, 1952, appellants' counsel made no objections to the form, simply taking the usual exception.

On January 31, 1952, prior to the entry of judgment, appellants filed a motion to strike the decision, for the first time assailing the local practice. This motion did not set forth any lack of opportunity to be heard. It did not point

out wherein the decision contained anything to which appellee was not entitled upon the record, stating in general terms that the decision "is not founded upon the law or any evidence in the record and does not conform to the oral decision of this Court". Detailed exceptions to the decision were filed on the same day, and were duly reviewed by the Court. All of appellants' rights were protected.

8. Concluding this point, appellee calls attention to the case of *Georgia R. R. and Banking Co. v. Redwine, supra.*[33] There, on a mere suggestion by the Attorney General of Georgia that there was an adequate state court remedy, a case that had made its way up to the Supreme Court was "ordered continued for such period as will enable appellant with all convenient speed to assert such remedies". It was not until the state court remedies had been tried and had been proved inadequate that the case was finally heard in the Supreme Court; it then was remanded to the District Court for determination of the merits. This case demonstrates the strength of the Johnson Act policy.

II

IF THE JOHNSON ACT AND THE POLICY THEREIN SET FORTH WERE INAPPLICABLE, THE DISTRICT COURT NEVERTHELESS WOULD HAVE HAD TO HOLD THE CASE AWAITING THE OUTCOME OF TERRITORIAL LITIGATION AND APPELLANTS HAVE NOT BEEN PREJUDICED.

Under the rule of *Spector Motor Co. v. McLaughlin,* 323 U.S. 101, 104, 105-106, if the Johnson Act and the policy therein set forth did not apply nevertheless this case would have had to be held in the District Court awaiting the outcome of territorial litigation. This was true because the scope and application of the tax law in respect of radio broadcasting had not been determined by the territorial courts. (See R. 301-302, 379-382.) The rule that state

[33] 339 U.S. 901, 342 U.S. 299, 863, cited in note 2, *supra.*

courts must construe state statutes before constitutional issues are reached, applies in the Territory of Hawaii.[34]

The Circuit Court of the Territory held that "the territorial tax law has been and is properly interpreted and applied by the Tax Commissioner and the law and assessments made thereunder are valid". That case now goes to the Supreme Court of Hawaii whence it is appealable to this Court and will be in a form to permit of decision on the points of constitutional law.

One has only to consider the fate of the *Spector Motor Co. case,* in which eight and a half years elapsed between the first decision,[35] and final disposition,[36] to understand the Territory's insistence that the present matter be decided on the record from the territorial court.

In the court below appellants conceded that there would be no reversible error in the denial of an injunction, and that what they really were seeking was declaratory relief (R. 374).[37] They further conceded (R. 160-163) that they would not be harmed if the case were held by the District Court awaiting the outcome of territorial litigation, which would be the *Spector Motor Co.* rule applicable if the Johnson Act policy were not. It does not appear wherein they have been harmed because instead of holding the case, the District Court dismissed it without prejudice.[38]

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[34] *Stainback* v. *Mo Hock Ke Lok Po,* supra, 336 U.S. 368, 383.

[35] 47 F. Supp. 671.

[36] 340 U.S. 602.

[37] As to the case below being insufficient to support an injunction see the complaint (R. 28, par. XXV), which falls short of showing threats to seize property and harass the appellants with a multiplicity of suits. *Boise Artesian Water Co.* v. *Boise City,* 213 U.S. 276, 282, 286; *Henrietta Mills* v. *Rutherford Co.,* 281 U.S. 121, 123-4; *Rieder* v. *Rogan,* 12 F. Supp. 307, 318 (D.C.S.D. Cal.). The mere prospect of an action in the state court is not a ground for federal injunctive relief, though the subject matter is the same, where both are in personam. *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 230; *Mandeville* v. *Canterbury,* 318 U. S. 47, 49.

[38] "Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling

III

THIS APPEAL CANNOT RESOLVE THE MERITS; IN NO EVENT COULD IT RESULT IN THE SUMMARY JUDGMENT WHICH APPELLANTS SEEK.

A. **This appeal cannot resolve the merits of the litigation.** The case below was "dismissed without prejudice" on the threshold. That this Court should proceed to the merits is inconceivable.[39] As an aid to the Court in appraising the situation, appellee submits his analysis of the points of law and fact involved:

B. **Radio broadcasting consists in both intrastate and interstate commerce, hence there is an area for state taxation.** This proposition was foreshadowed in the case of *Fisher's Blend Station v. State Tax Commission,* 297 U.S. 654, 656, 1936, and confirmed when, in *Vinsonhaler v. Beard,* 338 U.S. 863, 1949, rehearing denied 338 U.S. 896, the Supreme Court dismissed for want of a substantial federal question, the appeal taken as a matter of statutory right from the state court decision in *Beard v. Vinsonhaler,* 215 Ark. 389, 221 S.W. 2d 3. This now will be developed at more length.

Fisher's Blend Station v. State Tax Commission, supra, arose in a Washington State court, whence it reached the Supreme Court of Washington in 1935,[40] and the Supreme Court of the United States in 1936.[41] The case involved two radio stations, one a "Clear Channel" station, and the other

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or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

[39] *McDonald* v. *Smalley,* 1 Peters 620, 7 L. ed. 287; *Bradstreet* v. *Potter,* 16 Peters 317, 10 L. ed. 315.

[40] 182 Wash. 163, 45 P. ed. 942.

[41] 297 U.S. 650.

a "Regional" station. The case went up on stipulated facts[42] among them:

> "That a Clear Channel station is assigned a radio frequency by the Federal Radio Commission which ***is *designed and calculated for the effective transmission of radio broadcasting over the entire area of the United States****; that a Regional station is assigned a radio frequency band by the Federal Radio Commission for the effective transmission of radio broadcasting over the zone in which it is located and, therefore, is *designed and calculated for the effective transmission of radio broadcasting over the entire area of the zone in which it is located****"[43]
>
> That** Stations KOMO and KJR have been and now are engaged in broadcasting commercially in said manner***; that said broadcasting has covered said designated areas***, and that such broadcasting has been continuous and effective and*** has furnished an effective and valuable medium of advertising***
>
> ***that the gross income from the business***arises out of payments made by the National Broadcasting Company, Inc. for the broadcasting of said National and Pacific Coast programs, in the manner hereinabove described, and payments made by commercial advertisers, for programs originating at Stations KOMO and KJR and other stations situate in other states, such as KGW in Portland, Oregon, connected by wire with Stations KOMO or KJR, *who desire to reach the listening public in the areas and territories hereinabove described."*
>
> (italics added.)

The Supreme Court of the United States, after reciting the substance of the foregoing facts which, as the Court noted, were stipulated, held (1) that radio transmission "in all essentials" is like transmission by telegraph or tele-

[42] 297 U.S. at p. 651. Quotations that follow are from the record in the case, No. 628, Supreme Court of the United States, October Term, 1935.

[43] Under the regulations then in effect the United States was divided into five zones.

phone;[44] (2) that the business of the company was the transmission of advertising programs from its stations in Washington to listeners in other states;[45] (3) that the company's "entire income consists of payments to it by other broadcasting companies or by advertisers***" and "the customers desire the broadcasts to reach the listening public in the areas which appellant serves***";[46] (4) that "by its very nature broadcasting transcends state lines and is national in its scope and importance";[47] (5) that the taxed income was derived from "appellant's entire operations, which include interstate commerce", and "as it does not appear that any of the taxed income is allocable to intrastate commerce, the tax as a whole must fail."[48] It is important to note that the stipulated facts did not show any income from intrastate communications. Both of the stations offered commercial service over wide areas and all the advertisers desired to reach this widespread listening public.

The portion of the opinion numbered (4) in the foregoing paragraph is the portion on which appellants rely (Br. 55). But that was stated in connection with the argument, made by the State of Washington and erroneously upheld in the state supreme court, that the stations were merely furnishing local facilities and were unlike telegraph and telephone companies because they owned no facilities at point of reception. That argument has been set at rest. In disposing of it the Court held that radio broadcasting was interstate commerce, not that it was exclusively such.

State supreme courts in New Mexico[49] and Arkansas[50] have held that the radio broadcasting business is intrastate

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[44] 297 U.S. at p. 654.

[45] 297 U.S. at p. 654.

[46] 297 U.S. at p. 652.

[47] 297 U.S. at p. 655.

[48] 297 U.S. at p. 656.

[49] *Albuquerque Broadcasting Co.* v. *Bureau of Revenue,* 51 N.M. 332 and 54 N.M. 133, 184 P. 2d 416 and 215 P. 2d 819.

[50] *Beard* v. *Vinsonhaler, supra,* 215 Ark. 389, 221 S.W. 2d 3, appeal dismissed for want of a substantial federal question, 338 U.S. 863, rehearing denied 338 U.S. 896.

as well as interstate. Appellants concede that these cases so hold (Br. 29, 49, 60). The New Mexico tax was on business done within the state, including the business of radio broadcasting, measured by the gross receipts. The Arkansas tax was a flat license fee upon "the business of intrastate radio broadcasting". The New Mexico state court case did not go to the Supreme Court of the United States. The Arkansas case was appealed as a matter of statutory right,[51] not by petition for certiorari as appellants persist in representing (Br. 49). The appeal was dismissed for want of a substantial federal question[52] on the authority of *Crutcher v. Kentucky,* 141 U.S. 47;[53] rehearing was denied[54] despite a petition for rehearing that warned that citation of the *Crutcher case* would give the dismissal of the appeal great significance.[55] Appellee regards the action of the Supreme Court in this case as a definite holding[56] that, in the field of radio broadcasting, there is an area for state taxation.

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[51] 28 U.S.C. 1257 (2).

[52] 338 U.S. 863, 1949.

[53] The Court did not say to what part of the *Crutcher case* it referred but it is worthy of note that in the *Crutcher case* it had said: "But taxes or license fees in good faith imposed exclusively on express business carried on wholly within the state would be open to no such objection." (141 U.S. at p. 59).

[54] 338 U.S. 896.

[55] Pp. 5-6 of Petition for Rehearing in No. 342, Supreme Court of the United States, October Term, 1949.

[56] Undoubtedly the dismissal by the Supreme Court of a statutory appeal for want of a substantial federal question is a decision having weight as precedent. For example, in *Nesbitt* v. *Gill,* 332 U.S. 749, the Court affirmed the decision below on the authority of *Bacon & Sons* v. *Martin,* 305 U.S. 380, which was a dismissal for want of a substantial federal question, and in *Breard* v. *Alexandria,* 341 U.S. 622, 637, note 24, the court cited, in support of its decision that the Commerce clause did not invalidate the ordinance there involved, the case of *Giragi* v. *Moore,* 301 U.S. 670, 81 L. ed. 1334, which was a dismissal for want of a substantial federal question.

The reason why a dismissal of a statutory appeal for want of a substantial federal question has weight as precedent is that such an appeal (unlike certiorari) is a matter of right and dismissal constitutes a holding that the Supreme Court lacks jurisdiction. *Zucht* v. *King,* 260 U.S. 174, 176. See also Rule 12 of the Rules of the Supreme Court of the United States as amended in 1936.

Previously, in the *Whitmore case, supra*[57] a three judge federal court citing the *Fisher's Blend case* had recognized that radio broadcasting is "essentially in part intrastate commerce and in part interstate commerce". The three judge federal court in *KVL v. State Tax Commission,* 12 F. Supp. 497 (D.C.W.D. Wash.) on which appellants rely (Br. 46-49), likewise proceeded on the premise that both intrastate and interstate business are involved, deciding the case on the non-separability doctrine[58] which was repudiated a few months later in so far as taxes measured by gross receipts are concerned.[59] The Hawaii tax is measured by gross receipts.

The other federal cases cited by appellants involve matters of regulation, not taxation;[60] those that are tax cases involve flat license fees imposed indiscriminately on interstate and intrastate commerce and invalid for that reason.[61]

C. **The Hawaii tax is, and may be, imposed upon the receipts from intrastate communication.** The Hawaii tax[62]

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[57] Point I, p. 7, *supra.*

[58] 12 F. Supp. at p. 501.

[59] *Pacific Telephone and Telegraph Co.* v. *Tax Commission,* 297 U.S. 403, 414-417, discussed *infra,* part G of this point.

[60] That regulatory cases are not in point is developed in part E, *infra.*

[61] So held in *Pacific Telephone and Telegraph Co.* v. *Tax Commission,* discussed *infra,* part G of this point. Such flat license fee cases are *Whitehurst* v. *Grimes,* 21 F. 2d 787 (D.C.E.D. Ky.), *Station WBT* v. *Poulnot,* 46 F. 2d 671 (D.C.E.D. S.C.), and *Tampa Times* v. *Burnett,* 45 F. Supp. 166 (D.C.S.D. Fla.), all cited Br. 46. A somewhat similar state case is *City of Atlanta* v. *Atlanta Journal Co.,* 186 Ga. 734, 198 S.E. 788, to which the Arkansas case cited in note 50 is *contra.*

[62] "*Sec. 5455. Imposition of tax.* There is hereby levied and shall be assessed and collected annually privilege taxes against the persons on account of their business and other activities in this Territory measured by the application of rates against values, gross proceeds of sales or gross income, as the case may be, as follows:

***

D. *Tax upon theaters, amusements, radio broadcasting stations, etc.* Upon every person engaging or continuing within this Territory in the business of operating a theater, opera house, moving picture show, vaudeville, amusement park, dance hall, skating rink, radio broadcasting station or any other place at which amusements are offered to the public, the tax shall be equal to two and one-half per cent of the gross income of the business."

is upon the business of radio broadcasting within the Territory, that is, from stations in the Territory to audiences in the Territory, measured by the gross receipts from intrastate communication between points within the Territory.[63] In both transportation and communication cases[64] it repeatedly has been held that a state may tax the receipts from intrastate transportation or communication, between points within the state, even though the company also is engaged in interstate transportation or communication, between points in the state and points outside the state.

Joseph v. Carter and Weekes Co., 330 U.S. 422 (Br. 57) merely held, as is made clear in *Canton R. Co. v. Rogan*, 340 U.S. 511, 515, that cargo destined to an out-of-state point begins its interstate journey at the water's edge. *Western Livestock Co. v. Bureau of Revenue*, 303 U.S. 250, 259-260 (Br. 29, 30, 56) held that the interstate circulation of a magazine to an out-of-state reading public was not akin to interstate communication. At the same time it reiterated that the radio broadcasting business is comparable to the telegraph and telephone business. The quotation from the case, oft repeated by appellants (Br. 29, 56, 63) that "if broadcasting could be taxed, so also could reception", has no bearing where, as in the present case, the tax is confined to receipts from intrastate communication; the quotation merely explains why receipts from interstate communication may not be taxed.

Spector Motor Co. v. O'Connor, 340 U.S. 602 (Br. 59) involved a company engaged exclusively in interstate trucking. The court expressly held that the company did no intrastate trucking;[65] appellants' statement to the contrary

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[63] *Pacific Express Co.* v. *Seibert,* 142 U.S. 339.

[64] *Pacific Tel. and Tel. Co.* v. *Tax Commission, supra,* 297 U.S. 403 (railroads, telegraph and telephone company); *Ratterman* v. *Western Union,* 127 U.S. 411; *Western Union Telegraph Co.* v. *Alabama State Board,* 132 U.S. 472.

[65] 340 U.S. at pp. 607-608.

ignores the determinative point, namely, that the company was paid for delivering freight to points in other states and did no other business. The significant part of this case is the court's statement that:

> "***where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, [citing cases] may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate. *Interstate Pipe Line Co. v. Stone, supra; International Harvester Co. v. Evatt,* 329 U.S. 416; *Atlantic Lumber Co. v. Comm'r of Corporations and Taxation,* 298 U.S. 553****"
>
> (340 U.S. at pp. 609-610.)

Particularly significant is the citation in this connection of the *Interstate Pipe Line Co. case,*[66] which upheld a state tax on the receipts derived from transportation of oil from the oil field to the interstate loading point (the state conceding that it could not tax the further receipts from the loading of the oil for shipment to the out-of-state points designated by the oil companies).

D. **Appellants' station does not occupy the position that the two stations involved in the Fisher's Blend case were stipulated to have.** Appellants ask the Court to rule "as a matter of law" (Br. 48) that the business of its Honolulu radio station today is the same as that which the two radio stations in the State of Washington were stipulated to have in 1935. An ample record in the territorial court demonstrates the opposite. The record presently before this Court is sufficient to dispose of the contention that "as a matter of law" appellants are in the position they seek to occupy. The record here is as follows:

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[66] *Interstate Pipe Line Co.* v. *Stone,* 337 U.S. 662.

Appellants alleged (R. 17, par. XIII) that their "broadcasting is predicated upon a service area extending into various parts of the United States, foreign countries, and on the high seas adjacent to the Territory of Hawaii***" In the exhibits incorporated in appellee's Objections and appellee's Motion for Summary Judgment, appellee demonstrated that appellants' theory as to their service area could not be accepted in any pretrial proceeding and that they could not possibly, as a matter of law, occupy the position the two Washington stations were stipulated to have in the 1935 case. Appellee:

> Produced the F.C.C. Regulations and Standards of Good Engineering Practice showing that a regional station,[67] instead of being designed for effective transmission over an entire zone, as in 1935,[68] under the present F.C.C. regulations "is designed to render service primarily to a metropolitan district and the rural area contiguous thereto". (R. 44-45; 47 C.F.R. Sec. 3.22[c].)
>
> Showed by the F.C.C. Standards of Good Engineering Practice that a Class III-A station[69] is "normally protected to the 2500 uv/m groundwave contour nighttime and the 500 uv/m groundwave contour daytime" (R. 44-45; 47 C.F.R., 1949 edition, p. 120), and produced the map filed by appellants with their application for a F.C.C. license, showing these protected contours (R. 86) which do not even include the whole of the Territory of Hawaii.
>
> Produced F.C.C. computations showing that, according to the F.C.C. standards and graphs, a station such as appellants' is not expected to render satis-

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[67] Appellants' station is on a regional channel (R. 149).

[68] Compare the stipulated facts in the *Fisher's Blend case, supra,* p. 21.

[69] Appellants' station is a Class III-A station (R. 149).

factory service at the distances claimed by appellants (R. 45-47, 84-85, 89-90. Compare R. 120, 122, 124-126, 216-217).

Showed the number of stations assigned to the same frequency as appellants' station (R. 90-91).

Appellee, in moving for summary judgment (R. 141-143), did so under the Johnson Act. Appellee also was of the view (R. 49-50, 142) that by reason of the characteristics of the groundwave and skywave, the daylight programs were indisputably local; that therefore whatever the factual dispute as to the characteristics of distant reception, in any event it was a factual dispute as to the nighttime programs only; that furthermore some programs are of purely local interest; that appellants must fail since they could not sustain their claim of total tax immunity, and had never substantiated a claim to partial tax immunity.[70] But as previously noted the attempt to narrow the factual issues by pretrial procedure was not successful (R. 144-154). A trial has proved to be necessary and it has been had in the territorial court.

The findings in the territorial court demonstrate the impossibility of a court ruling, as a matter of law, that the station here involved is the same as the two Washington stations were stipulated to be in the 1935 case. This station was found to be just the opposite. The findings read in part:[71]

> "1. In so far as places outside the Territory of Hawaii are concerned, KPOA's broadcasts on its standard band do not afford effective or satisfactory service

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[70] See R. 57, 66, 68-70. *Department of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U.S. 252, 255-256. See also *Gorham Mfg. Co.* v. *Tax Commissioner*, 266 U.S. 265, 269-270.

[71] The quoted excerpt is from the findings requested at the conclusion of the trial, prior to argument, and approved by the Circuit Court when it rendered its oral decision.

that measures up to the standards for commercial coverage.

2. Time buyers do not buy time on KPOA as a medium of communication to an out-of-the Territory audience.

3. Where a KPOA broadcast is directed to an out-of-the Territory audience a shortwave relay is used, as in the case of the program 'Hawaii Calls'.

4. The tax has not been assessed on any receipts from broadcasts carried out of the Territory by shortwave relay or brought into the Territory by shortwave relay.

5. During daylight hours enjoyable listening to KPOA's standard band broadcasts is impossible at places outside the Territory, and is limited to ships or planes that happen to be within range.

6. During hours of darkness reception of KPOA's standard band broadcasts outside the Territory is too unreliable and irregular for such reception to have commercial value.

7. KPOA has a 'foreign language department' which is offered by it as a service to advertisers. This department conducts, each broadcast day, a substantial number of hours of broadcasts in Japanese and in a Filipino dialect. These broadcasts are scheduled by the station each day on a participating basis, that is, the station puts on the foreign language programs and sponsors buy spot announcements on the programs.

8. A large number of KPOA time buyers have no desire or occasion to reach any audience outside the Territory, even if effective and satisfactory service were offered.

9. The radio audience outside the Territory of Hawaii is not a factor in the selling or buying of radio time on station KPOA, where no shortwave relay is employed."

E. **The scope of the regulatory authority of the Federal Communications Commission is not the yardstick.** The United States Supreme Court has stated that the demarcation between interstate and intrastate commerce from

the standpoint of regulatory authority is not the same as from the standpoint of taxation. In *Kirschbaum Co. v. Walling,* 316 U.S. 517, 521, the court said:

> "***enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce****"

For example, the regulatory power of the Interstate Commerce Commission in the case of railroads is of such scope that the Commission may authorize a railroad to abandon a branch line located wholly with a state and over the protest of that state, as held in *Colorado v. United States,* 271 U.S. 153, and explained in *Pacific Tel. & Tel. Co. v. Tax Commission, supra,* 297 U.S. at p. 412. Yet the right of the state to tax the receipts from intrastate transportation is clear.

Since the regulatory power of Congress under the interstate commerce clause extends to the protection of interstate commerce from interference,[72] the assumption by Congress of control over all radio broadcast stations does not constitute an assertion by Congress that interstate communication is accomplished by every radio broadcast signal; some are merely interfering signals.[73]

Moreover, even where the interstate aspect of a radio broadcast is more than mere interference and accomplishes interstate communication this may or may not be a source of revenue. For example, interstate communications constantly are being accomplished under amateur licenses but this is not a source of revenue. As the tax is measured by gross receipts, interstate communications that are not a source of revenue ipso facto are eliminated from taxation.

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[72] *N.L.R.B.* v. *Pacific Gas and Electric Co.,* 118 F. 2d 780, 786 (C.A. 9th).

[73] See 47 U.S.C. 301 and compare Secs. 153 (b) and (e). See *National Broadcasting Co.* v. *U.S.,* 319 U.S. 190, 210, and see also 35 Ops. Att'y Gen. 126.